No. 72-402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL DYNAMICS CORPORATION, THE UNITED ELECTRIC COAL COMPANIES, and FREEMAN COAL MINING CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

HAMMOND E. CHAFFETZ
REUBEN L. HEDLUND
DONALD G. KEMPF, JR.
2900 Prudential Plaza
Chicago, Illinois 60601

KIRKLAND & ELLIS
Chicago, Illinois

ALBERT E. JENNER, JR.
Room 3300
135 So. La Salle St.
Chicago, Illinois 60603

JENNER & BLOCK
Chicago, Illinois

Of Counsel

Attorneys for Defendants

October 10, 1972

La Salle Street Press—Chicago/PrinterLink

INDEX

CITATIONS

Cases

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-402

UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL DYNAMICS CORPORATION, THE UNITED ELECTRIC COAL COMPANIES, and FREEMAN COAL MINING CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

F.I.d 10/10/72

MOTION TO AFFIRM

General Dynamics Corporation, The United Electric Coal Companies, and Freeman Coal Mining Corporation move pursuant to Rule 16 of this Court that the judgment of the District Court be affirmed. It is manifest that the decision below is correct and the questions of which review is sought are unsubstantial.

ARGUMENT

The District Court held that, "upon the basis of reliable, probative and substantial evidence contained in the record," the longstanding affiliation of The United Electric Coal Companies and Freeman Coal Mining Corporation does not violate Section 7 of the Clayton Act. (App. 66a.)[1] Chief Judge Robson concluded that "[t]he challenged combination has been in effect since 1959, and yet no adverse consequences with respect to competition were shown either to have occurred or likely to occur." (App. 2a, 64a.)

The decision below is singularly appropriate for summary affirmance.

First, the determination that the challenged combination does not violate Section 7 turned on a host of disputed and complex factual issues, each of which was resolved squarely against the government on the basis of abundant evidence. Second, resolution of the subsidiary questions of market definition was not critical to the decision, the Court stressing that no violation of Section 7 would be found "even were this court to accept the Government's unrealistic product and geographic market definitions." (App. 66a.) Third, the opinion involves no novel questions of law nor departure from precedent, nor does it raise substantial questions concerning proper criteria for assessing anticompetitive effects in Section 7 cases. Finally, there is no escaping the overwhelming record evidence that virtually all of the economically mineable strip reserves of United Elec-

[1] "J.S." references are to the Jurisdictional Statement, and "App." references are to the opinion of the District Court as set forth in Appendix A thereto. "DX" references are to defendants' exhibits; "GX" references are to government exhibits; ".... Tr." references are to the trial transcript; and ".... Dep." references are to depositions. "DPF" references are to the defendants' post-trial proposed findings of fact. Except where otherwise noted, emphasis has been supplied throughout.

tric have been sold under long-term contracts, that United Electric has neither the possibility of acquiring more nor the ability to develop deep coal reserves, and, therefore, an independent United Electric cannot contribute meaningfully to competition. The government's contrived argument that the District Court measured United Electric's competitive potential at the wrong time misreads the opinion and ignores the record.

The record demonstrates that the outcome of this litigation is totally without competitive significance. In 1960, when the Antitrust Division, learning of the combination, took no action, the United Electric-Freeman affiliation was already six years old and had been publicly disclosed since its inception. A dozen more years have now passed. In the interim, the utility industry—sophisticated, knowledgeable purchasers wielding great economic power and having formidable bargaining strength—has emerged as the only substantial market for coal production. The intervening years have also seen interfuel competition, stringent air pollution controls and anti-strip mining legislation add a new dimension to the already intense competitive struggle to serve this market. And while United Electric operated six mines when its affiliation with Freeman began, today it operates but three; these have short remaining lives and their coal has all been sold. Far from threatening "to ripen into a prohibited effect,"[2] this longstanding affiliation never has, does not now, and never can threaten competition. The government, despite a diligent search, was unable to find a single competitor or customer who thought otherwise. Under these circumstances, and particularly in view of the fact that United Electric's terminal condition is as irreversible as it was inevitable, this case poses no issues of concern

[2] *United States* v. *E.I. duPont deNemours*, 353 U.S. 586, 597 (1957).

to anyone, save the defendants. Accordingly, the Court should not be compelled to assume the burden entailed in a plenary review, and the decision below should be summarily affirmed.

I.

THE DECISION BELOW IS CLEARLY CORRECT

On the basis of two and a half years of pretrial discovery, a month-long trial, and the submission by both sides of extensive proposed findings, briefs and replies, the District Court reached the conclusion "that the challenged combination has not led, and is not likely to lead to a substantial lessening of competition." (App. 65a.) It did so only after determining a wide range of *factual* issues concerning the economic and commercial realities which provide the setting for such a competitive assessment: the history, mines, production, reserves and capabilities of the companies whose affiliation was challenged; the history, structure, nature and dynamics of the coal industry, its products and its markets; the distribution patterns for coal; the competition which a coal producer faces from other coal producers and from suppliers of alternative fuels; the nature of coal consumers, their buying practices and bargaining strength; the characteristics, location and availability of coal reserves; and a host of other details bearing on the past and likely future effect on competition of the United Electric-Freeman combination.

The "massive quantity of evidence" (App. 2a) supporting these factual determinations included more than 10,000 pages of exhibits and more than 7,500 pages of testimony by consumers[3] and competitors, by government officials, defend-

[3] As was stated in the Government's Response to Defendant's Proposed Findings (at page 225): "The Government admits that there is testimony in the record concerning the competitive implications of this acquisition from large, medium size and small public utilities, a rural electric cooperative, federal electric authority, a retail coal dealer and several industrial concerns."

ants, experts, trade association executives, and by others. In addition, a wealth of stipulated statistical evidence was introduced into the record, including the results of a court-ordered subpoena questionnaire issued to coal producers and consumers throughout the midwest. The results of this survey constituted a census with respect to such matters as coal characteristics, coal distribution patterns, coal reserves, interfuel competition and the characteristics and capabilities of virtually every strip and deep mine in the midwest.

What emerged from this expansive record is an articulate and reasoned opinion. The numerous factual predicates for the court's conclusion that the merger had no past or prospective anticompetitive effect are clearly spelled out in detail in the District Court's opinion and are summarized below.

1. As the government recognizes (J.S. 4), the utility market has become the only substantial outlet for coal production for coal producers such as United Electric and Freeman. In that market, these companies face sophisticated, knowledgeable purchasers wielding great economic power and having formidable bargaining strength. So indisputable is this fact that the government conceded that utilities have *at least* "equal bargaining power" with coal producers in the midwest. (App. 27a.)[4] This presented, of course, a radically different consumer situation from that involved in such cases as *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966) and *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966).

2. Moreover, intense interfuel competition gives utilities and other coal purchasers additional leverage and places

[4] See Government's Proposed Findings, § VI, C(9) at p. 25.

great pressure upon coal producers to remain competitive. (App. 26a-27a, 64a-65a.) This competitive pressure will further intensify as technological progress continues and as environmental concern imposes serious disadvantages on coal in its rivalry with other fuels. (App. 14a, 33a-34a, 37a-40a, 42a-43a, 52a, 65a.) Indeed, so serious has this latter concern become that none of United Electric's coal can be sold in Chicago. (App. 52a, 62a.)

3. It was also found with respect to the coal industry that there had been intense competition among coal producers in the past which was likely to increase in the future. (App. 18a.) See *United States* v. *First Nat'l Bank of Md.*, 310 F.Supp. 157, 175 (D.Md. 1970); *United States* v. *Tidewater Marine Service, Inc.*, 284 F.Supp. 324, 339 (E.D.La. 1968); *United States* v. *Nat'l Steel Corp.*, 1965 Trade Cas. 80,604, 80,610 (S.D. Tex. 1965); *United States* v. *Ling-Temco Electronics, Inc.*, 1961 Trade Cas. 78,621, 78,639 (N.D. Tex. 1961); *United States* v. *Columbia Pictures Corp.*, 189 F.Supp. 153, 196, 202 (S.D. N.Y. 1960).

4. The increase in the size of coal mining companies, the increase in the size of mines and the reduction in the number of coal producers were found to have occurred, not because small producers had been acquired by others but as the inevitable result of the change in the nature of demand for coal. This took place as the railroad, space heating and retail markets were lost to other fuels and as utilities shifted to long-term, large-scale contracts. (App. 18a, 24a, 60a.) Significantly, the government's economist at trial agreed. (Folsom Tr. 2581.) As the testimony of a number of witnesses demonstrated, small coal producers were, for all practical purposes, in a "different business." (App. 17a.) Again, this markedly distinguished the coal industry from the business of the defendants in *Von's*, *Pabst* and *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

5. The government's theory of the case was that the United Electric-Freeman combination was "an ordinary horizontal acquisition." (J.S. 9.) Accordingly, and as the court below found, crucial to the government's case was proof that United Electric and Freeman were actual or potential competitors. The evidence was, however, that an independent United Electric would not and could not compete with Freeman to any substantial degree. (App. 61a.) On the basis of testimony before the Court, it was found that none of the actual sales by United Electric in the period 1965 to 1967, the years chosen *by the government* for analysis, could have been competitive, excluding Commonwealth Edison. On the basis of stipulated data[5] and corroborative testimony, the court concluded that the Freight Rate Districts in which the mines and reserves of United Electric had been located since prior to 1959 served separate and distinct markets from those in which the mines and reserves of Freeman had been located. This lack of competitive overlap was confirmed by officials of the Tennessee Valley Authority, Union Electric Company, Dairyland Power Company, Central Illinois Light Company, Illinois Power Company, Wisconsin Public Service, Wisconsin Electric Power, Northern States Power, Electric Energy and Interstate Power Company, all major customers of United Electric or Freeman, as well as by the testimony of government officials, defendants and other coal producers and consumers.[6]

6. As confirmed by the testimony of one of its principal officers,[7] Commonwealth Edison — United Electric's and Freeman's largest customer and Illinois' largest coal con-

[5] DPF 316-320, 323-327, 330-334, 337-342, which set forth this data, were admitted by the government.

[6] See DPF 288-296, 315, 322, 329, 336, 344, 348-356.

[7] Gordon Corey, Finance Committee Chairman, had ultimate authority for Edison's coal purchases. (Corey Tr. 1580-81.)

sumer—was shown to be unaffected by the merger. (Corey Tr. 1611-13.) The evidence was that it must purchase coal from several Freight Rate Districts because of its substantial coal requirements and location of facilities. It was found to have the most extensive commitment to the use of nuclear energy for the generation of electricity of any electric utility in the world and was substantially increasing its use of gas and oil. (App. 62a, 33a, 58a.)[8] In any event, United Electric's contract with Edison expired in 1970 and was not renewed because of United's lack of reserves and Edison's low sulphur coal program. (App. 62a; see also Corey Tr. 1658-59.)

7. The "knowledgeable" record testimony of every other utility and coal consumer supported the defendants' contention that the merger had not led and was not likely to lead to a substantial lessening of competition. (App. 64a-65a). This testimony, subjected to Government cross-examination, was supplied in part by representatives of utilities accounting for the purchase of *more than 60 percent of the coal produced in the midwest for the generation of electricity*. Such testimony has significant probative value when it is reasoned and based on facts, and when it is given by knowledgeable witnesses who spell out the concrete reasons for their conclusions.[9] *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 367 (1963); *International Shoe Co.* v.

[8] Recognizing the force of these facts, the government hastened to assure the court that Commonwealth Edison does not possess an "unfair advantage" over midwestern coal producers. (See Government's Proposed Findings, § VI, ¶ C(9) at p. 25.)

[9] The government's lone effort to establish that such witnesses were indifferent to, and unsophisticated concerning, the competitive implications of mergers among coal producers was made during the cross-examination of A. H. Davis, the president of Central Illinois Light Company. This elicited the fact that Mr. Davis had, in the past, taken the initiative in complaining to the Department of Justice when his evaluation led him to conclude that another merger between two coal producers *did* pose a threat to competition. (Davis Tr. 753-54.)

Federal Trade Commission, 280 U.S. 291, 299 (1930); *United States* v. *United States Steel Corp.*, 251 U.S. 417, 451 (1920). As the government has observed in other cases, such testimony "is an invaluable and time honored mode of evidence in antitrust cases where the effect on competition is in issue." See *United States* v. *Pabst Brewing Co.*, 233 F.Supp. 475, 478-79 (E.D. Wisc. 1964), *rev'd* 384 U.S. 546 (1966).

8. Finally, the evidence showed that an independent United Electric could not contribute meaningfully to competition. (App. 64a.) It was proven at trial, and is not now disputed by the government, that control of sufficient coal reserves is of critical importance to the successful negotiation of long-term contracts with utilities. (App. 63a.) However, virtually all of the economically mineable strip reserves of United Electric were shown to have been sold under long-term contracts, and the evidence was that United Electric had neither the possibility of acquiring more nor the ability to develop deep coal reserves. (App. 65a.) On the basis of reports and testimony adduced by defendants from geologists, coal consumers and producers, government officials and the government's own rebuttal witnesses (see DPF 386-430), Chief Judge Robson decided these purely fact questions solidly in defendants' favor. In view of the extensive and reliable supporting evidence in this record, it is inconceivable that a plenary review would reveal these findings clearly erroneous.

The government's trial economist on three occasions during his testimony ventured his opinion that, given these facts, continuation of the United Electric-Freeman combination would not be adverse to competition and United Electric, if divested, would not be a viable competitive force. (Folsom Tr. 2584, 2599, 2621.) The court below was compelled to agree.

In sum, the case was tried and decided on the basis of particular facts found, in weighing all of the evidence, against the government. Neither novel theory nor break with precedent was required to reach the obvious conclusion that the merger did not violate Section 7. Since it is so clearly correct, that determination should be summarily affirmed.

II.

THE MARKET DEFINITIONS ADOPTED RAISE NO SUBSTANTIAL QUESTIONS.

A. The Decision Below Did Not Turn On The Subsidiary Questions of Market Definition.

As is clear from its opinion, the District Court's resolution of the subsidiary questions of market definition were not determinative of the ultimate issues in this case. Therefore, the questions raised by the government concerning the court's choice of product and geographic market are not material.

This Court has made it clear that in an action under Section 7 an "examination of the particular market—its structure, history and probable future" is necessary to "provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 322 n. 38 (1962). It was on the basis of precisely such an examination, involving a careful assessment of "*all* of the evidence" (App. 2a, 18a, 53a, 64a, 66a), that the District Court concluded that the challenged combination did not offend Section 7.

Significantly, not one of the many factors considered by the court in reaching its decision, as we have discussed above, hinged upon resolution of the questions of market definition. These questions were thus in no sense critical to the outcome, and the court specifically held that the United

Electric-Freeman affiliation would not violate Section 7 "even were this court to accept the Government's unrealistic product and geographic market definitions." (App. 66a; see also App. 59a-60a.) The court stated (App. 60a) that in so holding it was mindful of this Court's teaching in *Pabst* that questions of market definition are "entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition." *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549-50 (1966).

Thus, the District Court did not use the relevant product and geographic markets which it adopted as the key to the denominator for a simplistic mathematical test. To the contrary, it rejected any such mechanistic approach and focused instead on the "crucial question" of the combination's competitive effects.

Accordingly, the trial court's choice of energy rather than coal as the appropriate *product* market *was not* the predicate for a finding that the challenged combination supplied an insubstantial share of energy resources consumed in the midwest. It was designed instead to make it clear that the court had given full recognition to the intense competitive pressures from alternative fuels which, the court concluded on the basis of substantial evidence (see App. 27a-53a), were "crucially relevant to its assessment of the competitive effect of the United Electric-Freeman combination." (App. 53a)[10]

[10] There is, of course, no real distinction between this approach and that of the 10th Circuit in the recently decided *Kennecott* case. Thus, while the court there found *coal* to be the appropriate line of commerce, it nonetheless recognized the importance of considering interfuel competition: "The examiner's determination that nuclear energy and natural gas competition should be considered was largely based on the competition which is shown to exist in the generation of electrical energy by utility companies, and unquestionably in this area of economic activity coal is in direct competi-

Neither was the District Court's *geographic* market definition a prelude to an exculpating finding of permissible market share. Rather, it was intended to facilitate an appreciation of the fact that the only coal markets which had or could be served by Freeman and United Electric were the respective sales areas of the ICC-designated Freight Rate Districts wherein their mines were located, the facilities of Commonwealth Edison and facilities located in the Chicago area. If the combination had had or might have an anti-competitive effect, it would be in those areas. (App. 57a-59a, 62a.)

In the end then, the court's product and geographic markets were chosen not to foreclose examination of the *coal* industry in the *midwest*, but rather because they helped to "explain a great deal of what has happened in the *coal* industry and to *its markets*." (App. 52a-53a; see also App. 57a-59a.) The District Court gave careful consideration, for example, to the decline in number of midwest coal producers. As has been discussed above (*supra*, p. 6), it found that these small producers had not been acquired by others but had disappeared *as the direct result of inter-fuel competition*. (App. 18a, 60a.)[11]

---

tion with other fuels, and so it seems reasonable to consider as did the examiner the competition that exists between coal and other fuels, at least in the mentioned context." *Kennecott Copper Corp.* v. *Federal Trade Commission*, 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 74,157 at 92,834 (10th Cir.). See also *United States* v. *First Nat'l Bank of Md.*, 310 F.Supp. 157, 168 (D.Md. 1970).

[11] Similarly, the government's protestations about a "pronounced trend toward concentration" (J.S. 20) simply will not square with the trial record. The evidence was that, apart from Peabody Coal Company, the share of production accounted for by the two, four and ten largest producers had since 1959 either remained stable or, in some cases, declined. Presumably, the competitive implications of the growth in the share of midwest coal production accounted for by Peabody have been rectified to the satisfaction of the government by the consent decree in *United States* v. *Peabody Coal Co.*, 1967 Trade Cas. 84,376 (N.D. Ill.). See also GX 64, 72, 77,

In contrast to the "pragmatic, factual approach"[12] of the District Court, the government's "purely statistical approach" failed "to measure market strength or competition as it exists." (App. 59a.) Not only did the government's statistics "fail to reflect the very real competition coal faces from other forms of energy" and group "together coal producers into economically unrealistic markets," but they also ignored completely "the key factor in a coal producer's market strength—coal reserves." (App. 65a.)[13] Just how deficient the government's statistics were in light of the latter infirmity may be seen from the fact that although Humble Oil is estimated to control three and one quarter billion tons of deep coal reserves in the midwest (DX 61), it was not even listed as a competitor by the government because its initial mine had not yet come on stream and it thus had not yet started reporting production data.

The inadequacy of the government's approach to the case at bar was further demonstrated by the government's actions during the effecting of the consent decree in the *Peabody* case (*supra*, note 11). The Antitrust Division went on record there (DX 37) that it would approve "without reservation" a merger of the Midland operation (which Peabody had consented to sell) and Zeigler Coal and Coke

---

85; DX 84, 237; Steiner Tr. 2230-43. As for the combined United Electric-Freeman, the record shows, and the trial court found, that it *"accounted for less of the coal produced . . . in 1967 than it did in 1959."* (App. 60a, emphasis in original; see also App. 10a.) Significantly, the trial record also showed that the *deconcentration* trend in the midwest would accelerate as Humble Oil brought its three million-ton mine on stream (App. 41a), as Peabody divested itself of a six million ton per year operation (DX 84), and as additional United Electric mines closed as their reserves played out. (App. 7a.)

[12] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336 (1962).

[13] For a detailed discussion of the crucial role which reserves play in a coal producer's competitive efforts, see the trial court's opinion at App. 16a-24a.

Company. This combination would have been structurally indistinguishable from United Electric-Freeman, with the resulting combination in either situation constituting the second largest coal producer in Illinois and the midwest. The government's willingness to approve a Zeigler-Midland merger "without reservation" casts doubt on both the seriousness and the substance of its contention that anti-competitive effects will follow from a continuation of the United Electric-Freeman affiliation and would seem dispositive of the issue.[14] Significantly, when he was asked to make a competitive assessment of Zeigler-Midland following a simplistic statistical approach, the government's economist at trial balked, stating, "I would still want more information. I would still want to look further." (Folsom Tr. 2591).

That the District Court's focus on the "crucial question" of the combination's likely competitive effects was sound both in fact and in law is, defendants submit, beyond question. Whether it is technically correct to designate the relevant product market energy or coal, there can be no escaping the hard facts of record with respect to the "crucially relevant" pressures on coal producers such as United Electric-Freeman arising from the vigorous interfuel competition existing in the market place. The same is true of the relevant

---

[14]The government's inconsistent and irreconcilable actions also raise basic questions of fundamental fairness in the enforcement of the antitrust laws. We have here not a case where the government has merely taken no action on the one hand, while bringing suit on the other. Rather, it is a unique situation where the Antitrust Division has taken *affirmative* and contradictory action with respect to structurally identical mergers, approving one "without reservation" while simultaneously seeking to dissolve the other. Recognizing the questionable nature of such action, the Chief of the Antitrust Division's Chicago office has stated on the record that he has "some sympathy with the defendants [United Electric-Freeman] in the Zeigler matter." (Transcript of Pre-trial Conference of October 3, 1969, p. 10.) The Zeigler-Midland affair is discussed in detail in Defendant's Proposed Findings 449-456.

geographic markets: whether United Electric and Freeman are said to serve different areas within a market or different markets, "viewed in the context of all the evidence in this case . . . an independent United Electric would not and could not compete with Freeman to any substantial degree." (App. 61a.)

In light of such economic and commercial realities found to exist by the trial court on the basis of substantial evidence, it is clear that subsidiary technicalities of market definition were not determinative of the decision below. A remand of this case with directions to the court to adopt the market definitions urged by the government would thus occasion no change in the outcome of this litigation.[15]

B. The Market Definitions Adopted Do Not Require Review By This Court.

The Product Market

There was nothing either factually or legally novel in the District Court's examination of the likely competitive effects of the United Electric-Freeman merger within the framework of an energy market. Indeed, the Federal Trade Commission recently sent to Congress a report by its Bureau of Economics on interfuel substitutability (focusing largely on utility consumers) which finds that the results of its study support the conclusion that "an energy market exists." FEDERAL TRADE COMMISSION STAFF REPORT, INTERFUEL SUBSTITUTABILITY IN THE ELECTRIC UTILITY SECTOR OF THE U.S. ECONOMY 115 (1972). The purpose of the report was to analyze the extent of interfuel

[15] In *Brown Shoe*, this Court declined to consider whether the district court had been correct in rejecting certain proposed market definitions where such markets, even if proper, would not "aid us in analyzing the effects of this merger" and where the appellant could "point to no advantage it would enjoy" even if the markets in question were used in lieu of those employed by the district court. 370 U.S. at 327.

substitution "in order to establish the product boundaries between the various energy sources." *Id.* at 2. In doing so, it confirmed that coal, gas and nuclear energy trade in a "single market," and that "the primary fuels are generally good substitutes for one another." *Id.* at 115-16.

In his dissenting opinion in the Court of Appeals stage in the *Tampa Electric* litigation, Judge Weick was similarly persuaded that

> "there exists such a degree of cross-elasticity between coal and other boiler fuels as to constitute boiler fuels the relevant line of commerce in this case. Each of the boiler fuels—coal, oil, gas and atomic energy—is utilized in the same manner to produce the same result. As each is consumed power is produced to drive the generators which in turn produce electric energy."[16]

Numerous other cases have recognized the existence of interfuel competition as well. *See, e.g., Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 609 (1944); *Fuels Research Council, Inc.* v. *Federal Power Commission*, 374 F.2d 842, 845, 850, 852-54 (7th Cir. 1967); *National Coal Association* v. *Federal Power Commission*, 247 F.2d 86 (D.C. Cir. 1957); *Mississippi River Transmission Corp. and United Gas Pipe Line Co.*, 41 FPC 555 (1969); *Natural Gas Pipeline Co. of America* v. *New York Central RR. Co.*, 323 ICC 75 (1964); and *Natural Gas Pipeline Co. of America*, 28 FPC 731 (1962).

In its papers to this Court, the government all but concedes that the District Court was correct in finding energy to be *an* appropriate line of commerce within which to ex-

[16] *Tampa Electric Co.* v. *Nashville Coal Co.*, 276 F.2d 766, 780 (6th Cir. 1960), *rev'd*, 365 U.S. 320 (1961). In its reversal of the majority opinion, this Court found it unnecessary to decide whether boiler fuels, rather than coal alone, was the appropriate line of commerce. 365 U.S. at 328-30.

amine the competitive effects of the challenged combination. (J.S. 12.) It would fault the District Court, however, for its supposed "failure to recognize" that coal is an *additional* line of commerce for testing the combination's competitive effects. (J.S. 14.) But as we have noted, the District Court did not choose energy as the framework for its analysis in order to ignore the merger's competitive implications within the coal industry. Rather, such choice was made because it assisted in explaining "what has happened in the *coal* industry and to *its* markets." (App. 52a-53a.)

The claim that the District Court overlooked this Court's teachings in *Brown Shoe* is without substance. *Brown Shoe* teaches that submarkets *may* exist not that they *must* exist. Indeed, this Court rejected several of the submarkets urged in *Brown Shoe* itself, stressing that "the boundaries of the relevant market must be drawn with sufficient breadth . . . to recognize competition where, in fact, competition exists." 370 U.S. at 326.[17]

In this case, what the government really despairs of is nothing more than the District Court's refusal to make its

---

[17] As to the government's claim (J.S. 13) that coal meets "all" of practical indicia of a submarket set forth in *Brown Shoe*, the record is simply to the contrary. The evidence shows, and the court found, that coal has the same "uses" as the alternative fuels with which it competes (App. 27a), that it has the same "customers" (App. 29a-40a), that coal prices have a high degree of "sensitivity to price changes" of other fuels (App. 13a, 28a-29a, 36a-39a, 43a-44a, 51a-52a) and that the "industry and public"—and, indeed, the government itself—view coal as an integral part of the energy market and not as a "separate economic entity." (App. 13a-14a, 29a, 31a-32a.) The situation in the present case thus contrasts sharply with that in *Reynolds Metals* (referred to at page 15, note 9 of the government's Jurisdictional Statement) where the court of appeals held that "florist foil may rationally be defined . . . as comprising the relevant line of commerce in terms of (1) public and industrial recognition of it as a separate economic entity, (2) its distinct customers and (3) its distinct prices." *Reynolds Metals Co.* v. *Federal Trade Commission*, 309 F.2d 223, 227 (D.C. Cir. 1962).

assessment under Section 7 *solely* on the basis of coal production statistics. As was found, however, these fail to reflect the "very real competition" coal faces from alternative fuels, they obscure actual coal marketing patterns, and they ignore reserves, "the key factor in a coal producer's market strength." (App. 65a.) This was the "coal submarket" approach urged by the government below and found by the District Court "in the context of the entire record" to be "untenable." (App. 53a.)

The government is clearly wrong in its belief that the Court's product market choice is a substantial question which this Court should consider through a review of the entire trial record. As has already been discussed, the District Court specifically stated that its use of energy as the appropriate product market was not crucial to its decision. (App. 66a.) Moreover, it took care to make it clear that its decision to use an energy market was made on the particular factual record before it and with respect to the particular merger before it. The rejection of coal as a submarket was only made "in the context of the entire record before this court." (App. 53a.)[18]

Finally, reversal of the decision below is not required to establish that coal may be used as a product market when the facts warrant. In an opinion issued subsequent to the

---

[18] Federal antitrust enforcement authorities are already on record as recognizing this. In discussing the decision below in its brief to the 10th Circuit in the *Kennecott* case, *supra*, note 10, the Federal Trade Commission made the following observation: "While the record in that case is not before the Court, the District Court apparently concluded on the basis of the record in that case that the various fuels used by electric utilities constitute a single product market. Here . . . the Commission concluded, on the basis of trade realities reflected in the record of *this* case (I, 327-31), that coal, '[w]hether a market or a submarket,' is a relevant product market for the purposes of *this* case." (Brief For Federal Trade Commission, pp. 33-34, n. 40; emphasis in original.)

filing of the Jurisdictional Statement by the government in the present action, the 10th Circuit held, on the basis of a *different factual record* and in a *different geographic context*, that coal was the relevant product market for assessing the likely competitive effects of the merger there under consideration. *Kennecott Copper Corp.* v. *Federal Trade Commission*, 5 Trade Reg. Rep. (1972 Trade Cas.) ¶ 74,157 at 92,834 (10th Cir.)[19]

The Geographic Markets

Defendants submit that the District Court was correct in rejecting the government's approach to coal markets in this action. The government proposed two "markets" at trial, the midwest[20] and Illinois, and introduced statistics showing that a significant percentage of the coal consumed in these geographical areas was produced within them.

But the fact that 82 percent of the coal consumed in Illinois is produced in Illinois, no more demonstrates it to be a market than the fact that 100 percent of the coal sold in the western hemisphere is produced there indicates that there is a western hemisphere coal market. While such data may indicate that the market is *no larger than* the area in question, it plainly provides no insight as to whether the area is itself a market.

Coal is, of course, a transportation intensive commodity. This Court has long been aware that "[a]difference of a few

---

[19] As has already been noted (*supra*, p. 11, n. 11), despite the difference in technical product market definitions, there was no real difference in the approach to interfuel competition taken by the 10th Circuit in *Kennecott* and by the District Court below in the present action.

[20] The government restyled the midwest as the "Eastern Interior Coal Province Sales Area." Not a single witness supported the existence of such a market, and the government's own economist admitted three times during his testimony that he had "problems" with its use. (Folsom Tr. 2469-70, 2536, 2608-09; and see DPF 368-73).

cents per ton in the transportation charge is normally sufficient to divert a coal contract from one mine to another." *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 586 (1949). It is not surprising, then, that the District Court found that the "evidence clearly indicates that transportation costs largely determine those facilities for whose business coal mines are able to compete and those mines to which coal consumers can practicably turn for supplies." (App. 57a; see also App. 19a-20a.)

As the court observed, "[r]esponses to the subpoena questionnaire [which the District Court had ordered] sent to midwest coal consumers demonstrated that each Freight Rate District serves a distinct and definable area, as did the testimony of producers and consumers." (App. 57a.) Indeed, even the Bureau of Mines economist who prepared the statistics used by the government recognized that the market areas in which coal can be sold are determined by Freight Rate Districts and not by state boundaries. He testified that his statistics did not deal with specific markets and conceded that "anyone with even a minimum amount of knowledge of the coal industry" knows that consumers in the Fulton-Peoria area, for example, cannot be sold coal from Southern Illinois on a competitive basis. (Gallagher Dep. 3, 100, 103-04; see also DPF 344, 371.)[21]

The shortcoming of the government's market delineation procedure in drafting its complaint, then, was simply that it was incomplete. Had the government carried its own

[21] In rejecting the "markets" proferred by the government, the District Court was also no doubt influenced by the testimony of the government's economist that "you have to have the testimony from the people about the fact that they buy coal from all over this area, et cetera, to justify saying this is a market." (Folsom Tr. 2608.) As the court's opinion noted, "[t]here is no evidence in this record that any customer of either United Electric or Freeman purchased, or that any producer sold, coal throughout either of the Government's proposed markets." (App. 56a.)

technique one step further, it would have found, as did the trial court, that the ICC-designated Freight Rate Districts in which the mines of United Electric and Freeman were located[22] serve the "separate and distinct" sales areas of each Freight Rate District, the facilities of Commonwealth Edison and facilities located in the metropolitan Chicago area. (App. 57a-59a, 62a.) In keeping with this Court's teaching in *Brown Shoe* that the geographic framework within which the effects of a merger are examined must " 'correspond to the commercial realties' of the industry" (370 U.S. at 336), the District Court designated these markets as the relevant geographic markets in this proceeding.[23]

The government's claim (J.S. 16) that the markets adopted below "exclude all sales to Chicago [and] all sales to Commonwealth Edison" is wrong. Far from being excluded, sales to Chicago and Edison were specifically identified and carefully considered by the trial court. (App. 57a-59a, 62a.) That the government knows full well that the geographic markets adopted by District Court are not based on "enormous exclusions" is confirmed by its own admission in advance of trial that "[i]n 1967, approximately 97 percent of the production in the Fulton-Peoria Freight Rate District, 100 percent of the production in the Springfield Freight Rate District, 98 per-

---

[22] United Electric's mines were shown to be in the Fulton-Peoria and Belleville Freight Rate Districts, while Freeman's mines were shown to be in the Springfield and Southern Illinois Freight Rate Districts. (App. 4a, 6a, 9a-10a; Weir Dept. Ex. 1; Nugent Dep. Ex. 38.)

[23] It should be noted in this regard that the distribution patterns which formed the basis for the markets adopted by the trial court were not "alleged"—as the government now styles them (J.S. 15)—but rather *stipulated* in advance of trial. (See DPF 316-20, 323-27, 330-34, 337-42.)

cent of the production in the Belleville Freight Rate District and 85 percent of the production in the Southern Illinois Freight Rate District, was shipped to one or more of [these] market areas. . . ." (DPF 342.) Where two or more separate markets have been identified, the statement that sales to one market "exclude" sales made to another market is a tautology and meaningless.[24]

There is nothing novel in the District Court's factual approach to analyzing coal marketing patterns. To the contrary, both its choice of markets and rejection of the alternatives proposed by the government involve merely a recognition of the economic realties underlying an appreciation that even the most unsophisticated laymen have had for some 400 years: you don't "carry coals to Newcastle." JAMES MELLVILLE, AUTOBIOGRAPHY 163 (1583).

In any event, the District Court's finding that the markets served by the Freight Rate Districts in which the mines of United Electric and Freeman are located provide the appropriate geographic framework for assessing the likely effects of the challenged combination is confined to the record facts of this case. It no more conflicts with *Pabst*[25] or precludes the use of a state or regional geographic framework in future proceedings than does the holding in *Kennecott* (stipulated to by the government) that a *na-*

---

[24] That omitting dust is proper in analyzing coal distribution patterns is established by substantial evidence. The records shows that dust is a by-product of metallurgical coal and, like metallurgical coal, is a non-competing product with a market of its own. (See DPF 351-54 and record references cited therein.) As for the charts introduced by the government at trial purporting to show common customer shipments, these were thoroughly discredited at trial. (See generally App. 62a-63a; DPF 347-356; Defendant's Post-Trial Brief, pp. 72-80.)

[25] *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966).

tional geographic framework provided the proper framework for assessing the competitive implications of the merger there under consideration. *Kennecott Copper Corp.* v. *Federal Trade Commission, supra,* ¶ 74,157 at 92,834.

• • •

A plenary review of the trial record in this direct-appeal case would place a "great burden" on this Court, now faced with substantial and increasing demands on its time to consider a broad spectrum of legal issues.[26] Under these circumstances, and because the "entirely subsidiary" market definition questions of which review is sought are unsubstantial and not determinative, the decision below should be summarily affirmed.[27]

---

[26] *United States* v. *Singer Manufacturing Co.*, 374 U. S. 174, 175, n. 1 (1963). See also *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 355 (1962) (Clark, J. concurring opinion); *United States* v. *Borden Co.*, 370 U.S. 460, 477, n. (1962) (Harlan, J. dissenting opinion).

[27] The government's slur on the independence and integrity of the opinion below is wholly unwarranted and should be repudiated. The assertion (J.S.11, n.8) that two parts of the district court's six-part opinion were taken *verbatim* from Defendants' Proposed Findings of Fact is spurious. Of the 145 proposed findings referred to by the government, no less than 112 were omitted, revised or supplemented. Further, of the 33 proposed findings that *were* adopted *verbatim*, 22 were admitted in whole or in part by the government. There can be no doubt then that the trial court's opinion is truly its own. Chief Judge Robson, who heard all of the evidence and spent nearly two years fashioning his decision, was the coordinating judge in the civil electrical antitrust cases, an original member and the first chairman of the Judicial Coordinating Committee for Multiple Litigation and one of the principal architects of the Manual for Complex and Multidistrict Litigation.

III.

THE COURT'S CONCLUSIONS WITH RESPECT TO UNITED ELECTRIC'S LACK OF COMPETITIVE POTENTIAL WERE CORRECT AND SUPPORTED BY SUBSTANTIAL EVIDENCE

Industry Field and Round Prairie

The government's lay speculation (J.S. 22-24) that United Electric could survive as an independent coal producer on the basis of its Industry Field strip reserves and its Round Prairie deep reserves was rejected by the trial court on the basis of abundant record evidence. These fact questions were among the principle issues below and were decided on the basis of reports and expert testimony from geologists, mining engineers, industry witnesses and defendants. The District Court agreed these reserves were not mineable and could not be developed by United Electric (App. 9a-10a, 63a). Surely, resolution of these types of questions, on the basis of all the evidence, is peculiarly within the province of the trier of fact.

The government's claim that Industry and Round Prairie hold the key to a successful future for United Electric has the same hollow ring it had below following government counsel's confession that "as of today they are not commercially valuable." (Transcript of Pre-trial Conference of October 3, 1969, p. 23.)

Apart from the obvious fact that the twelve and a half million tons of coal at Industry would hardly be sufficient for the opening of a modern coal mine (see App. 16a-18a, 21a-22a), the evidence was that the field has no mining potential. The coal seam is thin, the overburden ratio high,[28] unfavorable mining conditions are present and the

[28] Overburden ratio expresses the amount of overburden (cubic yards) which must be removed to uncover a ton of coal. (App. 16a, n. 17.)

field is distant from transportation arteries. Moreover, the high sulphur content of the coal bars it from any market where air pollution controls are keyed to that factor.[29]

An evaluation of the Industry Field by the firm of Paul Weir Company—consultants for the Federal Government, coal producers, railroads, electric utilities and financial institutions, and acknowledged by one of the government's own witnesses to be one of the most widely known and highly regarded mining engineering companies in the world (Hopper Tr. 1894; see DPF 38)—confirmed the reserves had no promise. (DX 87.) During his deposition by the government, Mr. Weir testified that "I don't think these reserves will ever be mined, in any circumstances." (Weir Dep. 60.) The government's attempt to present trial testimony to the contrary failed completely. (See Hopper Tr. 1876-78, 1895-1901.)[30]

The government's Industry Field contention is further betrayed by the inference that United Electric has still *other* uncommitted but mineable strip reserves. (J.S. 23; see also J.S. 2 and 12.) These "other reserves" consist of a patch of less than 350,000 tons separated from United

[29] See DPF 391-396 and record references therein cited. Hereafter, references to defendants' proposed findings below are meant to include the record references set forth in those findings.

[30] The government completely misquotes the testimony of the former UEC president. (J.S. 23-24.) Mr. Nugent said Industry would *not* be mined, under any circumstances, until "all of the commercially mineable coal in Fulton County is exhausted" and placed that finality twenty years in the future, not ten to twelve. (Nugent Dep. 343, 346.) Not only did his deposition testimony in its entirety (*id.* at 338-47) make clear the field had no promise ("this was a most uneconomical proposition and a most unwise investment," *id.* at 342), but Mr. Nugent's trial testimony on the subject two years later was similarly pointed: "With the further development of nuclear energy, my present thinking is that the Industry Field will probably never be mined and that the company had better take its licking now and dispose of the land, at farm prices if need be." (Nugent Tr. 1946; see also Tr. 1983-85.)

Electric's Buckheart mine and unreachable, and a similarly isolated tract of 1,700,000 tons some distance from the company's Fidelity mine. In its post-trial papers, the government was candid enough to admit that "these reserves, by themselves, could not support a new mine operation." (Gov't. Resp. to DPF 397, p. 204.)

The government takes no issue with the court's finding that United Electric does not have the possibility of acquiring additional economically mineable strip reserves. (App. 65a.) It could not credibly do so, in view of the substantial evidence presented at trial "by experts, by state officials, by industry witnesses and by the Government itself indicating that economically mineable strip reserves that would permit United Electric to continue operations beyond the life of its present mines are not available." (App. 63a; see also DPF 398-411.)

Equally dispositive was the evidence with respect to the deep coal reserves at Round Prairie and United Electric's inability to mine them.

As the Court found, again in one of the major factual disputes below, "United Electric is a strip mining company with no experience in deep mining nor likelihood of acquiring it." (App. 61a.) The government admitted that until 1959, in communications with stockholders, landowners and others in the industry, United Electric held itself out as strictly a strip mining organization. (Gov't. Resp. to DPF 101, p. 18.) In its 1956 Annual Report, the company stated "[f]or thirty-eight years your Company has been engaged in a single business—mining bituminous coal by the strip or open pit method." (GX Kolbe Dep. Ex.2 p. 7.) The government's Statement of Facts misleads the Court when it says United Electric "has not operated an underground *mine* since 1954." (J.S. 8.) As the government admitted, this was

a "short lived and unsuccessful drift *operation*"[31] at one of United Electric's strip mines between 1952 and 1954. (Gov't. Resp. to DPF 103, p. 19.) There was no underground *mine* at all.

While the government would like to make something of the fact that United Electric began acquiring its Round Prairie deep reserves in 1958, "the year before Material Service assumed control of UEC" (J.S. 22), it overlooks the fact that it admitted to the District Court that the United Electric-Freeman affiliation was initiated in 1954 and that "[s]ince *at least 1958*, UEC has made it a practice to confer with Freeman regarding any deep mining possibility." (Gov't Resp. to DPF 113, 124, pp. 22-23.) The evidence demonstrated that United Electric never gave real consideration to deep coal reserves until it and Freeman's management had become closely associated. (See DPF 114.)

The government purports to rely on the testimony of Nicholas Camicia, president of *both* Freeman and United Electric in the late 1960's, in contending that all one needs is money to undertake successfully deep coal mining. (J.S. 23.) What the government omits to state is that Mr. Camicia—by the time of trial, president of the Pittston Company, one of the country's largest deep coal producers—testified that based on his professional knowledge and expertise as a deep mining engineer and executive, he did not see how United Electric could possibly make a successful grass roots entry into the deep mining of coal and "[t]hey would have made a mistake if they had tried." (Camicia Tr. 1393, 1422.)

The expert opinion in the record was that United Electric's experience as a strip miner would be of no assistance

[31] Drift mining involves merely punching into an already exposed seam of coal, usually from the pit floor. (See Camicia Tr. 1388-91.)

to it in attempting to undertake deep mining operations. (DX 87, pp. 28-30; Camicia Tr. 1392-93.) The government admitted that the extraction processes and technology are different for strip and deep coal mining, (Gov't. Resp. to DPF 415, p. 214) and that deep mining poses different engineering problems and working conditions from strip mining. (*Id.*, DPF 417, p. 215.) Further, the testimony of a number of utility consumers confirmed that because of the complexities, difficulties and risks which deep mining involves, a large buyer of coal would be reluctant to enter into a contract for deep coal with a company with no proven experience. (See DPF 419-20.) As observed by the 10th Circuit in the *Kennecott* case, the "essentials" for new entry into the coal business are "extensive reserves and ready ability to deliver," "experience, know-how and equipment." *Kennecott Copper Corp.* v. *Federal Trade Commission*, *supra*, ¶ 74,157 at p. 92,836 (10th Cir.). As for deep mining, United Electric has none of these.

Given the fact that, as the record supports, there is no reasonable probability that United Electric could successfully undertake deep mining, there is therefore no reasonable probability that it would try. Both common sense and the government's own prior observations belie the validity of any parallel (J.S. 22-23) between what Humble Oil, subsidiary of the world's largest industrial corporation, would do and could do, and what an independent United Electric might successfully undertake. The government pointed out (DX 81-83) in *United States* v. *Standard Oil Co. (New Jersey)*, 253 F.Supp. 196 (D.N.J. 1966), that there is no correlation between Standard Oil's ability to make a grass roots entry into deep mining and that of a smaller company attempting a similar venture. (*Id.* at 200, 208, 223, 227.) In any event, Humble's mine had not opened at the time of trial and as one witness put it, "the jury is still out" as to whether it will be successful. (Camicia Tr. 1424.)

The government's reference to Ayrshire Collieries (J.S. 23) is less than candid. While it is true that Ayrshire did develop a deep mine after many years of operating as a strip miner, it did not do so *until after acquiring two deep mine companies*. Even so, the mine has been a failure and Ayshire has written off five million dollars of its investment and would "absolutely not" have undertaken the venture had it known what was in store. (Hopper Tr. 1878-81).

Finally, the evidence was that United Electric's only deep coal reserve field, Round Prairie, was not mineable by *anyone* in the near future. (See DPF 428-29.) The government admitted "they may not be commercially mineable at the present time." (Gov't. Resp. to DPF 429, p. 220.)

As with all the other central questions of fact in this case, the District Court's findings with respect to United Electric's competitive potential were based on the evidence in the record. We submit that if that record is reviewed, it cannot be reasonably maintained that there is not substantial evidence to support the trial court's conclusion that "virtually all of the economically mineable strip reserves of United Electric have been sold under long-terms contracts, and United Electric has neither the possibility of acquiring more nor the ability to develop deep coal reserves." (App. 65a.)

The Argument that United Electric's Competitive Potential was "Cut Off" has no Merit

The government concedes that the District Court was correct in assessing whether the challenged acquisition may substantially lessen competition "from the vantage point of the time of suit." (J.S. 21). Neither does the government quarrel with the logic of the conclusion that if United Electric has no competitive potential, continuation of its affiliation with Freeman poses no anticompetitive threat. Even the

government's trial economist repeatedly agreed. (Folsom Tr. 2584, 2599, 2621.) The government counters, however, that the court below erred in failing to determine the "competitive potential cut off by the acquisition" in 1959. (J.S. 2, 22.) This contention is contrived and has no merit.

The government grasps for straws in citing two sentences (J.S. 21) out of the court's 73 page opinion which it contends demonstrate that the court measured United Electric's competitive potential at the wrong time. As the government knows full well, the court's observation that there was no evidence that "reserves are *presently* available," and that "United Electric *has* [not] the ability to acquire more," (App. 63a; emphasis is original) were not intended to contrast United Electric's condition and prospects at trial with those obtaining in 1959. Rather, they were responsive to the government's speculations at trial—repeated here (J.S. 23-24)—that mining conditions have changed in the past, that they may continue to change, and that "properties which UEC has investigated in the past . . . may become economically strippable in the future." (Govt. Post-Trial Brief, p. 141; see also Def. Post-Trial Brief, pp. 88-89.)

Although the government, until the filing of its Jurisdictional Statement, had never suggested—much less urged—that the court measure United Electric's competitive potential in *1959*, the trial court time-and-again specifically addressed itself to the 1959 evidence. For example, "[t]he challenged combination has been in effect *since 1959*, and yet no adverse consequences with respect to competition were shown either *to have occurred* or likely to occur," (App. 64a); "[t]he combination is *in its second decade without demonstrating* any of the indicia of concentration" (App. 60a); "[t]he mines and coal reserves of United Electric are, *and have been since prior to 1959*, lo-

cated in different Freight Rate Districts than the mines and coal reserves of Freeman" (App. 62a); and "[t]hese companies *have been* and are now predominantly complementary in nature" (App. 61a).[32]

The government's criticism (J.S. 20-21) of the court's concern with events in the period immediately preceding and surrounding the trial comes with ill grace. As the decision of the trial court points out, these were "the years chosen by the Government for analysis." (App. 62a.) Thus, the principal focus of the complaint is on 1965 to 1967 (Complaint ¶ 11-20); the government's alleged common customer charts were confined to the 1965-67 (GX 85-91); all of the government's concentration and market share charts combined United Electric and Freeman data only in 1967 and subsequent years (GX 73, 86; compare GX 71 with GX 72, and GX 84 with GX 85); and the government advised the trial court that its coal industry rebuttal witnesses would be called to testify "as to the *availability* of strip and underground coal reserves" and "future strip mining possibilities." (Government Counsel, Tr. 1377).

The government's argument (J.S. 24) that "if UEC does not now have adequate reserves, or the prospects of acquiring more, it is because of management policies imposed on it *after* the acquisition," is totally at odds with the record evidence.

---

[32] It is not surprising that the District Court found nothing in the 1959 evidence indicating a Section 7 violation. The Antitrust Division in its investigation at that time did not even view the situation as warranting the issuance of a complaint. As the District Court's opinion notes, shortly after Material Service achieved common control of UEC and Freeman, Material Service was itself acquired by General Dynamics. "An investigation by Antitrust Division of the Department of Justice ensued, during which the Government was furnished information with respect to the stock ownership of Freeman and United Electric. No further action was taken by the Government." (App. 8a)

The events which decreed that United Electric would reach the end of its competitive significance in the 1960's did not take place *after* 1959, as the government would like to have it, but in the years long prior to that date.

As has been discussed at pages 26-27 above, United Electric's failure to acquire experience in deep coal mining had been the conscious choice of United Electric management since the 1920's. That this destined United Electric to a future of exclusively strip mine operations (absent merger with a significant deep coal producer), is confirmed by the fact that, except for Humble Oil,[33] no company has even attempted to open a large-scale deep mining coal operation on a grass roots basis in recent history in the midwest. (See DPF 24.)

With respect to strip coal reserves, again it was the conscious choice of United Electric management prior to 1959 not to be aggressive in its acquisition of additional coal reserves.[34] (Kolbe Dep. 189, 300-02.) The government admitted that prior to 1955 United Electric acquired *only seven* of the more than 200 fields of coal reserves it had examined. (Gov't Resp. to DPF 84, p. 9.) As a result, and as the government also admitted, by 1960, Peabody Coal Company, Truax-Traer, Ayrshire Collieries, Southwestern and Midland Electric Coal Companies (all predominant or exclusively strip mine companies) had reserves substantially greater than United Electric. (Gov't Resp. to DPF 86-87,

[33] But see page 28, *supra*.

[34] The facts with respect to United Electric's poor pre-merger reserve acquisition policies and capabilities and the post-merger steps to improve the situation were detailed in Defendant's Proposed Findings 84-123. It was because of its debilitated condition prior to the challenged merger that United Electric, as the District Court's opinion noted, had made a number of "unsuccessful attempts to merge with, or to acquire, other Illinois coal producers." (App. 8a, n. 7.)

p. 11.) It was in the 1950's and before that the scramble for strippable coal reserves took place. United Electric, under its pre-merger management, chose not to participate in that contest. (See DPF 84-89, 91.)

So intense was this competition for reserves that, according to the opinion of one expert geologist (whose principal occupation since 1932 had been the acquisition of coal rights for sale to producers) "by 1960, there was no longer any possibility of acquiring or establishing, for transfer to coal producers, any new economically mineable strip coal acreage in the Illinois basin [Illinois, Indiana and West Kentucky] of sufficient size to justify the opening of new mines." (DX 88: Organ Dep. *passim*.) This was confirmed by the testimony from other companies that had been unsuccessful in searching for midwestern strip coal reserves at the end of the 1950's and after. (Dorrance Dep. 11; stipulated testimony of George Shipley (Humble).)

The evidence showed that once control of United Electric was gained in 1959 by Material Service-Freeman, vigorous efforts were commenced to acquire additional reserves. (See DPF 92-97.) United Electric was even then having trouble with its utility customers because of its reserve position. (See DPF 89.) Accordingly, and as the government admitted, United Electric investigated many potential strip coal areas throughout Illinois, Indiana and Kentucky, but these efforts were unsuccessful. None of the fields examined were found to contain economically mineable coal. (Gov't. Resp. to DPF 95-96, p. 16.)

In the face of the concession in its Response to Defendants' Proposed Findings that, "the Government admits that after 1959, UEC's management sought to acquire economically recoverable reserves, i.e., reserves which were merchantable and capable of making a profit," (*id.* at p. 15) it ill becomes the government now to contend that United

Electric's management policies after 1959 are to blame for the company's lack of adequate reserves.

The government's "1959" argument is a contrived afterthought. In any event, the court's analysis covered the full history of the combination from prior to 1959 to date, and its effect on competition throughout that period. There was no obscuring of "the real competitive potentialities cut off by the acquisition," for the record demonstrated the contrary. Not only did the affiliation with Freeman launch United Electric on a vigorous (though admittedly unsuccessful) coal reserve exploration program, provide it with access to deep mining experience and know how, but United Electric's competitive potential was actually prolonged beyond what it would otherwise have been. As the District Court found, *"United Electric's existing contracts with Central Illinois Light Company, Northern States Power, and Union Electric are backed up by the reserves of Freeman and could not have been obtained without that guarantee"* (App. 63a, emphasis in original; see also DPF 443-445).[35]

In sum, if there were any competitive potentialities of United Electric that were "cut off," it was *prior to* 1959 and at the hands of its prior management.

[35] As was candidly stated by the government in its Response to Defendant's Proposed Findings (p. 24): "The Government admits the record shows that possibly in three instances, UEC would not have been awarded a particular coal contract without committing some Freeman reserves to the contract. . . ."

CONCLUSION

The motion to affirm should be granted.

Respectfully submitted,

HAMMOND E. CHAFFETZ
REUBEN L. HEDLUND
DONALD G. KEMPF, JR.
2900 Prudential Plaza
Chicago, Illinois 60601

KIRKLAND & ELLIS
Chicago, Illinois

ALBERT E. JENNER, JR.
Room 3300
135 So. La Salle St.
Chicago, Illinois 60603

JENNER & BLOCK
Chicago, Illinois

Of Counsel

Attorneys for Defendants

October 10, 1972